UNITED
NATIONS

AT

Administrative Tribunal

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LIMITED

AT/DEC/553
24 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 553

Case No. 586: ABRAH

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Michael Anane Abrah, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, extended to 15 February 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. The Pleas

4. The Applicant requests the Tribunal to find:

(i) that the decisions to extend his fixed-term appointment for only six months, and to separate him from the Organization were dictated by improper motives, an unjust post facto evaluation of the Applicant's performance, and serious violations of relevant rules and administrative procedures by the Respondent;

(ii) that an expectancy of renewal of his fixed-term appointment for at least one year, was created as a result of specific actions taken by the Respondent, including a transatlantic conversation between Applicant and the Respondent;

(iii) that the granting of within-grade salary increment, effective 16 June 1989 was an explicit statement of satisfactory performance; a statement which is inconsistent with the so-called special performance report which the Respondent subsequently used as ground for terminating his appointment;

(iv) that as a consequence, the Applicant is entitled to an ex-gratia payment of six months net base salary, less the two weeks ending 31 December 1989 (the date of his actual separation from the Organization) for which he had received a salary, as well as termination indemnity equivalent to two years of completed service (15 June 1988 to 14 June 1990), calculated in accordance with the schedule under Annex III of the Staff Rules;

(v) that the Respondent remove from the Applicant's official status file, the post facto performance evaluation report."

Whereas the Respondent filed his answer on 27 September 1991;

Whereas the Applicant filed written observations on 24 October 1991;

Whereas the facts in the case are as follows:

Michael Anane Abrah entered the service of UNDP on 16 June 1988. He was offered a one year fixed-term appointment, under the 200 Series of the Staff Rules applicable to technical assistance project personnel, as a Treasury Officer in the Division of Finance (DOF) at the L-3 level.

On the expiration of the Applicant's appointment on 15 June 1989, he travelled to Ghana on annual leave accrued during the previous year's service. To this end, and at the Applicant's request, the Administration approved a salary advance.

According to the record of the case, on 13 July 1989, the Chief, Treasury Section, who was also the Applicant's immediate supervisor, telephoned the Applicant in Ghana, to inform him of his decision to extend the Applicant's appointment for six months only. Then, on 2 August 1989, when the Applicant returned to New York, the Chief, Treasury Section, informed the Applicant that his performance had not reached expected standards warranting a one year's extension of his appointment. He would thus recommend a six months' extension to enable the Applicant to find other job opportunities, within or outside UNDP.

On 3 August 1989, the Applicant asked the Chief, Treasury Section, for "a written clarification" of the reasons for not extending his appointment for a year, as well as for a copy of his performance evaluation report. In a memorandum dated 10 August 1989, the Chief, Treasury Section, set forth his evaluation of the Applicant and the reasons that had led him to recommend a six months', instead of a one year's extension of his appointment. On 15 August 1989, the Applicant instituted a rebuttal to this evaluation.

On 5 October 1989, the Deputy Assistant Administrator, Bureau for Finance and Administration (BFA), informed the Chief, Staff Development and Placement Section, Division of Personnel (DOP), of the composition of the panel (the Investigative Panel) he had designated to conduct an impartial investigation of the Applicant's rebuttal.

At meetings held between 6 and 9 October 1989, the Appointment and Promotion Board reviewed a recommendation dated 29 June 1989 by the Deputy Assistant Administrator, BFA, and endorsed on 4 July 1989, by the Staff Development and Placement Section, DOP, to extend the Applicant's appointment for six months only.

In a report dated 23 October 1989, the Investigative Panel submitted its findings on the Applicant's rebuttal to the Deputy Assistant Administrator, BFA. As regards the reasons given by the Chief, Treasury Section, for not extending the Applicant's appointment for a full year, the Panel was satisfied that his assessment that the Applicant "did not achieve a satisfactory level of knowledge of the existing Treasury Systems" was correct. The Panel also noted from the evidence presented, that the Applicant "did utilize the resources available to him, however [it] was unable to determine whether these resources were used effectively." Lastly, with regard to the assessment by the Chief, Treasury Section, that "time was utilized on areas which were not Treasury Section priorities, and which could have been handled by a General Service staff member" the Panel found that "it could not support a situation which would be tantamount to the absence of a chain of command" and that "despite mitigating factors", for example, the fact that "the Applicant was new to the Organization" and that the "technological environment changed within Treasury shortly after his arrival", the weight of evidence support the evaluation by the Chief, Treasury Section of the Applicant's performance.

In a memorandum dated 24 October 1989, the Deputy Assistant Administrator, BFA, informed the Director, DOP, that he saw "no adverse action on the part of [the Chief, Treasury Section, DOF] or any supervisor connected with the Division of Finance." He stated: "the case ... boils down to a simple matter of competence. [The Applicant] still does not have the 'know-how' that we need for the post that he now occupies in the Treasury Section of DOF." He then asked what action would be taken on the case by the Department of Personnel in the light of the recommendation by the Chief, Treasury Section, to extend the Applicant's appointment for six months only. In a letter dated 10 November 1989, a Personnel Officer informed the Applicant that his fixed-term appointment, which expired on 15 June 1989, would be extended for a further period of six months, through 15 December 1989.

On 14 November 1989, the Chief, Staff Development and Placement Section, DOP, transmitted to the Applicant a copy of the Investigative Panel's report, as well as a copy of the Deputy Assistant Administrator's, BFA, communication of 24 October 1989 to the Director, DOP.

On 15 November 1989, the Director, DOP, advised the Applicant that in light of the findings of the Investigative Panel and the recommendation by the Deputy Assistant Administrator, BFA, it had been decided that the Applicant's appointment would "be allowed to expire on 31 December 1989". On the same date, the Applicant asked the Secretary-General to review the administrative decision to extend his fixed-term appointment for six months and 16 days instead of one year.

On 8 February 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 24 September 1990. Its considerations, conclusion and recommendation read as follows:

"Considerations

...

40. ... the Panel had to consider whether, on the basis of approvals of annual leave and salary advance, and in the absence of action to separate the appellant from service upon the expiration of his first contract of appointment, a legitimate expectancy of renewal of appellant's contract had been created in his favour.

41. The Panel observed that it was not standard practice for the Administration to approve accrued annual leave and salary advance with respect to a staff member on a fixed-term appointment whose contract of employment had expired unless a renewal of such appointment was imminent. Nor was it customary for the Administration to fail to take action to separate a staff member or to give notice of such action upon completion of a contract if it was anticipated to be his or her final appointment with the Organization.

42. In this regard, it is the view of the Panel that when the Respondent approved accrued annual leave and salary advance for the appellant upon the expiration of his fixed-term appointment on 15 June 1989 and permitted him to return to his post after the annual leave, and when it failed to take separation action, a reasonable and legitimate expectancy for renewal of his contract was created.

43. However, the Panel felt that the legitimate expectancy created in favour of the appellant was for continuation in employment and not necessarily for specific duration of such employment. Accordingly, it is the view of the Panel that on 10 November 1989 when the appellant's fixed-term appointment was extended for six months, effective 16 June 1989, his legitimate expectancy was honoured, even though the extension was not for one year as the appellant had hoped.

...

45. In this regard, the Panel felt that in light of its finding that the appellant had a reasonable and legitimate expectancy of renewal of his contract which was honoured, it did not have to consider whether or not the contested decision was flawed by procedural irregularities.

Conclusion and recommendation

46. The Panel concludes that the appellant had a reasonable and legitimate expectancy of renewal of his contract which was honoured by the Administration.

47. Accordingly, the Panel makes no recommendation in support of this appeal."

On 28 September 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision.

On 14 February 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to extend the Applicant's appointment for six months rather than for one year had been taken by the Respondent before the Chief, Treasury Section, prepared the Applicant's evaluation.

2. The Respondent's decision to extend the Applicant's appointment for six months only was flawed by procedural irregularities. The Respondent availed himself of a special performance report to rubber stamp a decision he had taken earlier in the year.

3. The Respondent has failed to substantiate his contention that the performance evaluation report, prior to the expiration of fixed-term appointments, required pursuant to UNDP/ADM/HQTRS/372/Rev.1, applies only when the Respondent intends to extend appointments for one year.

Whereas the Respondent's principal contentions are:

1. The decision to limit the renewal of the Applicant's appointment to 31 December 1989 and not to extend it beyond that date did not infringe his rights.

2. The procedure leading to the decision not to extend the Applicant's appointment beyond 31 December 1989, was not flawed by improper motives, irregularities or lack of due process.

The Tribunal, having deliberated from 9 to 24 June 1992, now pronounces the following judgement:

I. In the present case, the Tribunal has to consider whether, as a result of specific actions taken by the Respondent, the Applicant had an expectancy of renewal of his fixed-term appointment for at least one year. In this respect, the Tribunal took into account the Respondent's decision to approve annual leave and to grant a salary advance before the Applicant proceeded on home leave. The latter occurred after the expiration of the Applicant's fixed-term appointment and there was no action by the Respondent before that date to separate the Applicant from service.

II. The Tribunal notes that, as a holder of a fixed-term appointment, the Applicant had no expectancy of renewal of his appointment. Staff rule 204.3(a) and (d), as well as the Applicant's letter of appointment, state clearly that fixed-term appointments do not carry an expectancy of renewal or of conversion to any other type of appointment. Moreover, staff rule 209.2(b) provides that separation from service on the expiration of a fixed-term appointment takes place automatically and without prior notice on the expiration date specified in the letter of appointment. In this connection, the Tribunal has consistently held that: "The decision whether or not to renew a fixed-term appointment is within the discretion of the Secretary-General and, in the absence of countervailing circumstances, non-renewal will not give rise to any rights on the part of the staff member." (Cf. Judgement No. 199, Fracyon (1975), para. I).

III. The Tribunal finds no evidence that the UNDP Administration entered into a binding commitment to renew the Applicant's fixed-term appointment for one year or longer. On the contrary, the Applicant was informed that since his performance had not reached expected standards to justify a one-year renewal of his appointment, he would be granted a six months' extension to enable him to find other job opportunities.

IV. In connection with the above-mentioned notification, the Tribunal recalls Judgement No. 319, Jekhine (1983), para. I, in which it stated, inter alia:

> "I. The Tribunal does not question the right of the Respondent not to renew a fixed-term contract but would stress, as stated in numerous cases before it, that the discretionary power of the Respondent in this field should be free of any improper motive or prejudice. The Tribunal has also held that while a fixed-term contract cannot create any legal expectancy for its continuance or renewal, reasonable expectation for extension can often arise from the totality of circumstances surrounding a staff member's separation from service, and that such expectation should be taken into account."

V. Taking into account the totality of the circumstances of this case, the Tribunal concurs with the Joint Appeals Board finding, that it was not standard practice for the Respondent to approve home leave travel on accrued annual leave and authorize a salary advance to a staff member holding a fixed-term appointment that was about to expire, or had expired, unless the Respondent intended to renew such an appointment. The Tribunal also notes that it was not customary for the Respondent to omit informing a staff member in advance that he would not extend his or her appointment, if that was his intention.

VI. In the light of these circumstances, the Tribunal is of the view that, when the Respondent approved home leave travel on accrued annual leave, authorized a salary advance for the Applicant upon the expiration of his fixed-term appointment on 15 June 1989, and allowed him to resume his functions after returning from home leave, a reasonable expectancy was created that the Applicant's contract would be extended.

VII. However, the Tribunal concurs with the Joint Appeals Board's conclusion that this expectancy was for continuation of the Applicant's employment, but not necessarily for an additional year. Therefore, the Tribunal considers that on 10 November 1989, when the Applicant's fixed-term appointment was extended for six months, with effect from 16 June 1989, the Respondent fulfilled the Applicant's expectancy, even though the extension granted was not for one year, as the Applicant had hoped.

VIII. The Tribunal notes also that the extension of the Applicant's appointment for six months, through 31 December 1989, allowed for completion of the rebuttal process initiated by the Applicant against the evaluation of his performance by his supervisor. In this regard, the Tribunal recalls Judgement No. 138, Peynado (1970), para. VI, in which it stated:

> "The Staff Rules and Administrative Instructions provide a measure of protection against arbitrary assessment of the efficiency or performance of staff members. In particular, the right of rebuttal of any part of a periodic report and the procedure prescribed for handling such rebuttal afford a valuable protection to the staff member against arbitrary or prejudicial assessment."

In the light of the findings and conclusions of the Investigative Panel set up by the Administration to review the Applicant's rebuttal, the Respondent had an entirely reasonable basis for confirming the decision not to extend the Applicant's appointment beyond 31 December 1989.

IX. The Tribunal now turns to whether the procedure leading to the contested decision not to extend the Applicant's appointment beyond 31 December 1989, was flawed by improper motives, irregularities or lack of due process. In this respect, the Tribunal has consistently held that: "The burden of proving prejudice or improper motivation rests with the Applicant." (Judgement No. 93, Cooperman (1965), para. XII). Accordingly, an Applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. In the present case, the Tribunal finds, as did the Joint Appeals Board, that the Applicant has produced no evidence to substantiate his allegation that improper motives or prejudice were behind the Respondent's discretionary decision not to extend his appointment beyond 31 December 1989.

X. As to the allegations concerning procedural irregularities and lack of due process, the Tribunal finds some instances of administrative negligence. For example, the failure to complete a performance evaluation report, as required, prior to the expiration of the Applicant's appointment and the preparation of a post facto evaluation are undesirable practices. However, the Tribunal finds that the Applicant has suffered no injury as a consequence and therefore his pleas in these respects cannot be sustained. The Applicant's case was investigated thoroughly, and he was accorded full opportunity to be heard during the Investigative Panel proceedings in which the requirements of due process were met.

XI. Nevertheless, the Tribunal considers it appropriate to reiterate its views as expressed in Judgement No. 504, Coulibaly (1991), para. XII, that: "... the Administration should ensure that procedures concerning fixed-term appointments should, in the future, be strictly observed." That consideration is also applicable to the present case.

XII. For the foregoing reasons the Tribunal:

1. Rejects the application.

2. Orders the Respondent to incorporate a copy of this judgement in the Applicant's personnel file.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

Geneva, 24 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
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AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/554
25 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 554

Case No. 579: FAGAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas at the request of Susan R. Fagan, a staff member of the United Nations, specially recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1990 and 31 January 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 January 1991, the Applicant filed an application containing the following pleas:

"Section II: Pleas

The Administrative Tribunal is respectfully requested to rule that:

1. Selection for the post of Records Management Officer, VN-89-054 was flawed because subjective and extraneous considerations were at the root of the selection process;

2. UNICEF correct the inequity that resulted from the flawed selection by offering an equivalent appointment."

Whereas the Respondent filed his answer on 28 February 1991;

Whereas, on 18 May 1992, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 12 May 1966, as a File Clerk/Typist at the G-2 level. After serving on a succession of fixed-term appointments and, with effect from 12 November 1966, on a probationary appointment, she was granted a permanent appointment on 1 May 1968. During the course of her employment with UNICEF, the Applicant was promoted to the G-3 level on 1 February 1967, to the G-4 level on 1 July 1974 and to the G-5 level on 1 January 1980, with the functional title of Registry Assistant. On 10 July 1987, the Applicant became Basic Assistant List Control Clerk at Headquarters. On 13 January 1992, she was assigned to the Office of the Director of the Programme Division.

In March 1989, the Division of Personnel issued a Vacancy Announcement to advertise the P-3 level post of Records Management Officer in the Division of Information Resources Management. The announcement was in accordance with the guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 governing the appointment of staff to posts which had been upgraded and were encumbered by staff. Four staff members applied for the position, including the Applicant and the incumbent of the post.

According to the record of the case, a Selection Advisory Panel met on 7 July 1989, with a representative from the Information Resources Management Office, the Division of Personnel and the UNICEF Appointment and Promotion Committee (APC). After reviewing the qualifications of all candidates, the Panel included the Applicant and the incumbent of the post on a short list and recommended to the APC that the incumbent of the post be selected on the basis of his qualifications and experience. On 13 July 1989, the APC endorsed the recommendation by the Selection Advisory Panel to appoint the incumbent of the post to the position.

In a letter dated 20 July 1989, a Senior Recruitment and Staff Development Officer informed the Applicant that she had not been selected for the post. On 14 September 1989, the Applicant requested review of the administrative decision not to appoint her to the post of Records Management Officer. In a letter dated 16 October 1989, the Deputy Executive Director, on behalf of the Executive Director, informed the Applicant that the Executive Director had decided to maintain the contested decision.

On 14 November 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 22 March 1990. Its considerations, conclusions and recommendation read as follows:

"Considerations

...

22. It noted, as has also been pointed out by the Respondent, that, in her request for administrative review, the appellant alleged that the selection decision was made contrary to UNICEF's current appointment, placement and rotation policies. However, in her letter of appeal, she mentions only that this decision 'infringed upon my right for proper consideration for a vacant position for which I hold the required qualifications and experience' and requests that the JAB compare the qualifications, skills and experience of the two shortlisted applicants in relation to the job requirements. In this connection, the Panel recalled that the United Nations Administrative Tribunal has consistently held that it cannot substitute its view for that of the Secretary-General concerning the evaluation of the performance of a staff member, since this matter lies within the Secretary-General's discretionary authority. Therefore, it was limited to examining whether the appellant was afforded due process and whether the selection was tainted by prejudice or motivated by extraneous factors.

23. The Panel noted that the appellant alleges that the 'selection decision' infringed upon her right to be fairly considered for the post and requests that UNICEF be committed to 'correct the unfairness created which is compounded by an element of discrimination.' It reviewed the procedures followed by UNICEF in making its selection for the post in question and could find no indication of unfairness or discrimination.

24. The Panel also noted that the appellant does not specify in what way the selection process was unfair or discriminatory, other than stating that the UN system often discriminates against women in general by bypassing them for appointment and promotion in favour of men. In this connection, the appellant is apparently under the impression that it is incumbent upon the respondent 'to bring forth concrete evidence to show fairness and equity and lack of discrimination.' Since the Tribunal has consistently held that 'the burden of proving prejudice or improper motivation rests with the Applicant', (Judgement No. 93, Cooperman), the Panel could not entertain the appellant's request.

Conclusions and recommendation

25. The Panel concludes that the appellant has not sustained the burden of proving discrimination, unfairness or improper motivation in connection with the decision not to select her for the post of Records Management Officer. Moreover, the Panel could find no such evidence after its own examination of the matter.

26. Accordingly, the Panel makes no recommendation in support of the appeal."

On 30 March 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in the light of the JAB report, had decided to maintain the contested decision and to take no further action on the case.

On 31 January 1991, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. In not selecting the Applicant for the post in question, the Respondent based himself on an unsubstantiated, subjective and flawed evaluation.

2. The Applicant is more qualified to discharge the functions of the post than the person selected therefor.

3. The decision not to select the Applicant for the post contravenes recent decisions of the General Assembly which mandate that, in filling posts, preference should be given to a female candidate, if she has, at least comparable qualifications with a male candidate.

Whereas the Respondent's principal contention is:

Staff have a right to consideration for promotion in accordance with the Staff Regulations and Rules and Instructions promulgated thereunder. The Applicant was accorded such consideration for promotion and thus the selection of another staff member for promotion did not violate her rights.

The Tribunal, having deliberated from 2 to 25 June 1992, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rule first that the "selection for the post of Records Management Officer, VN[Vacancy Notice]-89-054 was flawed because subjective and extraneous considerations were at the root of the selection process" and second, that UNICEF "correct the inequity that resulted from the flawed selection by offering an equivalent appointment."

II. In the explanatory statement of the application, the Applicant asserts that while "proper selection procedures were supposedly followed, ... the substantive evaluation was flawed" because the selection decision rested upon the written recommendation of the Director of the Division of Information Resources Management, whose assessment read: "Although [the Applicant] has some of the qualifications required, I do not feel that she presently has the in-depth experience of the records management area or the supervisory skills or the technical expertise required by the post". In the Applicant's opinion, "this assessment [was] entirely unsubstantiated and ... based purely upon subjective factors." She also asserts that, "more importantly, no comparative factual analysis was made of the relative qualifications and work experience of the two leading candidates in relation to the job requirements." (Emphasis in the original text).

III. In addition, the Applicant is of the opinion that when her case was considered by the Joint Appeals Board (JAB), it "felt that it could only look into whether proper selection procedures were followed but not whether the substance of the matter was appropriately determined."

IV. In the same context, the Applicant makes a wide-ranging allegation that the selection decision goes against recent decisions of the General Assembly to the effect that, in filling vacant posts, preference should be given to a female candidate if she has at least comparable qualifications with a male candidate. In the Applicant's view, this requirement was not met, despite the contention by UNICEF that the Administration was actively pursuing a policy of affirmative action in favour of women, especially women from developing countries. At the same time, the Applicant emphasizes that it is also a policy of UNICEF, that general service staff members who have taken the initiative to upgrade their skills should be given favourable consideration for posts in the professional category.

V. Finally, the Applicant alleges that she may have been victimized because of her involvement in staff activities: the Applicant was Chairperson of the UNICEF Global Staff Association, officer of the UN Staff Union and representative of the UN Staff Council to the Annual General Meetings of the Coordinating Committee for Independent Staff Unions and Associations.

VI The Applicant maintains that the decision not to select her for the post of Records Management Officer was contrary to the current appointment and placement policy of UNICEF, especially as stated in paragraph 2 of CF/AI/352/Amend.4, dated 15 July 1988, which provides, inter alia, "...in no case can the reclassification procedure be ... viewed as an alternative method for promotion...", and was also contrary to the UNICEF policy of rotating internationally-recruited staff members. In addition, the Applicant expected that her service with UNICEF for 23 years would adequately be taken into account.

VII. The Tribunal observes that in her request for review of the decision not to appoint her to the post, the Applicant argues that the decision infringed upon her right for proper consideration for a vacant position for which she possessed "outstanding qualifications in records management" as well as "extensive work experience". She states that she satisfied the job requirements "far more than the other candidates for the post". The Applicant subsequently requested that the JAB compare her qualifications, skills and experience with those of the other applicant who applied for the job and who was short-listed with her by a panel constituted to advise on the selection for the post.

VIII. After considering the issues raised by the Applicant in her request for administrative review, in her letter of appeal to the JAB and in her application in the present case, the Tribunal draws attention to its jurisprudence that, as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General and that, "consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy". (Cf. Judgement No. 312, Roberts (1983), para. II). Accordingly, in the present case, the Tribunal

would not substitute its view for that of the Secretary-General concerning the evaluation of the Applicant's performance, since the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.

IX. The Tribunal must therefore establish whether the existence of prejudice or improper motive, breach of procedure or any other extraneous factor has vitiated the decision contested by the Applicant.

X. The Tribunal notes that the Applicant does not question that selection of the candidate for the post of Records Management Officer by the Selection Advisory Panel and the Appointments and Promotion Committee was in accordance with the review procedures set forth in the UNICEF Personnel Administration Manual. She suggests however, that these procedures were merely a formality and goes on to challenge the substance of the selection process. In this regard, the Tribunal notes that, according to its jurisprudence, candidates are entitled to full and fair consideration for appointment. From the evidence on record, the Tribunal concludes that the Applicant's rights were respected. It could find no indication of unfairness or discrimination against her.

XI. In considering the Applicant's allegations that the selection for the post was flawed because subjective and extraneous considerations were at the root of the selection process, the Tribunal was aware that all choices are inevitably subjective to some extent. However, the question is whether, in the present case, the decision to select another candidate was tainted by prejudice or motivated by extraneous factors. In this respect, the Tribunal has consistently held that "the burden of proving prejudice or improper motivation rests with the Applicant...". (Cf. Judgement No. 93, Cooperman (1965), para. XII). Accordingly, an applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. The Tribunal concurs with the JAB's conclusion that the Applicant has not discharged the burden of proving discrimination, unfairness or improper motivation in connection with the decision not to select her for the post of Records Management Officer.

XII. On the Applicant's allegation that the decision was contrary to UNICEF policy of rotating internationally recruited staff members, the Tribunal notes that the relevant section of CF/AI/352/Amend.4 of UNICEF, provides in paragraph 5, that:

> "In reviewing the incumbent of the old post along with other applicants, the APC [Appointment and Promotion Committee] will take into account the Organization's policy to rotate internationally-recruited staff members recruited under the 100 Series of UN Staff Rules, who have completed their full tour of duty required at a given duty station. Therefore, in case the incumbent of the old post has completed his/her full tour of duty and has applied for the new/upgraded post, the APC may recommend him/her for the new/upgraded post if it is satisfied that he/she is by far the best qualified applicant and the interest of the Organization would be best served by his/her appointment. Should the incumbent be appointed to the new/upgraded post, he/she would be expected to remain at the duty station for at least half the period of the normal tour of duty."

In the light of the above, the Tribunal could not find that the decision taken by UNICEF and contested by the Applicant was contrary to UNICEF policy on the matter.

XIII. According to the Applicant, "the selection decision goes against recent decisions of the General Assembly to the effect that in filling vacant posts, preference should be given to a female candidate if she has at least comparable qualifications with a male candidate."

In this regard, the Tribunal notes that the General Assembly has adopted a number of resolutions directed to the improvement of the status of women in the United Nations Secretariat. In accordance with these resolutions, the Secretary-General approved the First Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and took specific measures to implement the recommendations included in the report (ST/SGB/220(Annex). In addition, in guidelines issued by the Office of Human Resources Management for the appointment and promotion bodies, directed to "the improvement of the status of women", it is provided, inter alia, that "...attention should be paid to exceptional merit, ability to perform at a

higher level..." (paragraph 4(a) of annex II of administrative instruction ST/AI/338/Add.5).

The Tribunal finds no evidence in the present case of a violation of these guidelines.

XIV. With regard to the Applicant's allegations that she may have been victimized because of her involvement in staff activities, the Tribunal notes that the Applicant has not produced adequate evidence in support of her contentions.

XV. The Tribunal concludes, in the light of the above, that there is no evidence of prejudice or extraneous factors vitiating the decision not to select the Applicant for the post of Records Management Officer.

XVI. In view of the foregoing, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

Geneva, 25 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 555

Case No. 587: SELAMAWIT MAKONNEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas at the request of Ms. Selamawit Makonnen, a former staff member of the Economic Commission for Africa, hereinafter referred to as ECA, the President of the Tribunal, with the agreement of the Respondent, extended until 15 March 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 March 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

Applicant contests the decision rendered by the Joint Appeals Board on 16 May 1990, under article 9, paragraph 1, of the Statute.

Applicant wants to be reinstated to her post; or, if and only if that is impossible, to an equivalent post elsewhere; plus medical and salary compensation, retroactive to 31 March 1988 (...)."

Whereas the Respondent filed his answer on 28 May 1991;

Whereas the Applicant filed written observations on 2 July 1991;

Whereas, on 15 May 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 2 June 1992, the Applicant submitted an additional document;

Whereas, on 10 June 1992, the Tribunal put questions to the Respondent, to which the latter replied on 11 June 1992;

Whereas, on 15 June 1992, the Applicant filed observations on the Respondent's reply;

Whereas the facts in the case are as follows:

The Applicant entered the service of ECA at Addis Ababa, Ethiopia, on 13 November 1961. She served initially on a short-term appointment as a Puncher/Verifier at the G-5 level. She received a probationary appointment on 13 December 1961 and a permanent appointment on 1 March 1974. The Applicant was promoted to the G-7 level on 1 December 1978, with the functional title of Senior English Typist. At the time of the events that gave rise to the present proceedings, the Applicant was working in the ECA International Trade and Finance Division.

In May 1987, the United Nations Medical Director, upon the recommendation of the ECA Chief Medical Officer, authorized the Applicant's medical evacuation to Nairobi for 15 days to undergo a series of medical tests unavailable at her duty station, for the purpose of diagnosing the cause of the Applicant's long-standing migraine headaches.

The Applicant decided, however, to travel to the United States of America, rather than to Nairobi, for medical treatment and paid the difference in air fare herself. She left Addis Ababa on 24 August 1987.

On 18 September 1987, the Applicant reported to the United Nations Medical Director at New York. According to him, at their meeting he reminded the Applicant that she had already exhausted her approved sick leave of two weeks and noted that his approval of her medical evacuation had been for the purpose of conducting specific tests not available in Addis Ababa and to "rule out serious reasons for her headaches".

During October 1987, the Medical Service received three medical reports concerning the Applicant. The first report was prepared by the Chairman of the Department of Medicine at the Medical Centre in Princeton, who concluded that the Applicant "probably [had] atypical vascular headaches", but as she had many dental problems, he was proposing a "course of restorative dental

treatment which might take six months". The other two reports, from a dentist in New Jersey, described the required dental care, indicating that the treatment would take six months.

On 19 October 1987, the Applicant was examined by the Deputy Medical Director, who referred her to the Montefiore Hospital Headache Clinic. She also referred the Applicant to another physician for a second opinion. He, in turn, referred her to the School of Dental and Oral Surgery at Columbia University.

In the meantime, on 27 October 1987, the Director, International Trade and Finance Division, ECA, wrote to the Chief of Personnel, ECA, informing him that the Applicant had not reported for work on 1 October as expected.

On 4 November 1987, the United Nations Medical Director saw the Applicant again at Headquarters. He advised her that he could not approve sick leave beyond that date since "adequate time had been given for her to see various specialists" and "she had also had the opportunity to receive essential dental care" which might not be easily available in Addis Ababa. On 5 November 1987, the United Nations Medical Director conveyed to the Chief Medical Officer, ECA, the substance of his conversation with the Applicant and stated that although the Applicant wished to remain in the United States for dental care, she was "not sufficiently disabled" to be considered on sick leave.

In a letter dated 9 November 1987, the Applicant asked the Chief, Administration and Conference Services Division, ECA, for an extension of her sick leave, as well as for financial support to help her meet the costs of her medical treatment.

On 19 November 1987, the Chief, Personnel Section, ECA, asked the Regional Commissions Liaison Office at Headquarters to notify the Applicant that she report to duty forthwith. The United Nations Medical Director, having confirmed that sick leave had been approved through 4 November 1987 only, warned her that any absences after that date would be considered unauthorized.

On 2 December 1987, the Chief, Personnel Section, ECA, informed the Liaison Officer and the Office of Personnel Services at Headquarters that ECA was unable to accede to the Applicant's request to extend her sick leave and to grant her financial assistance. The Applicant should therefore be informed that if she did not resume her duties immediately, her absence after

4 November 1987, would be considered unauthorized. If she did not report back for duty by 14 December 1987, ECA would consider that she had abandoned her post.

On 11 December 1987, the Applicant sought reconsideration of the decision not to extend her sick leave and not to grant her financial assistance. Alternatively, the Applicant asked for special leave without pay for six months. On 29 December 1987, the Chief, Personnel Section, ECA, advised the Applicant that ECA would not approve her request for special leave without pay. Accordingly, her name had been removed from the payroll, retroactively as of 5 November 1987. Unless she reported for duty by 11 January 1988, action would be taken to separate her for abandonment of post.

On 13 January 1988, the Chief, Administration and Conference Services Division, ECA, informed the Office of Personnel Services at Headquarters that ECA had, for humanitarian reasons, agreed, at the Applicant's request, to extend the Applicant's annual leave from 5 November 1987 to 28 December 1987. A new deadline of 20 January 1988 was set for her to report for work. If she failed to do so by that date, procedures would be initiated for her separation for abandonment of post.

In a reply dated 18 January 1988, the Personnel Officer at Headquarters, at the request of the Applicant, informed ECA that the Applicant would be unable to return to Addis Ababa on 20 January 1988, because she was undergoing further medical tests, of which the last would be conducted on 23 March 1988. Despite having been made aware of the serious consequences of missing the deadline, the Applicant stated that "there was nothing she [could] do since she must undergo the tests and await results".

On 25 January 1988, ECA sought Headquarters authorization to separate the Applicant for abandonment of post, effective 28 December 1987. On 5 February 1988, a Personnel Officer at Headquarters wrote to the Applicant confirming their telephone conversation earlier that day, when she had informed the Applicant that ECA had recommended her separation from the Organization for abandonment of post. She urged the Applicant to report to Addis Ababa immediately and warned her that unless she documented her intent to return to ECA by 17 February 1988, the Office of Human Resources Management* (OHRM) would have no alternative but to separate her from service for abandonment of post.

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* Successor of the Office of Personnel Services

In her reply dated 10 February 1988, the Applicant stated, inter alia, that she "never wanted nor had any intention of abandoning" her post in ECA but that she must complete her medical treatment before returning to Addis Ababa. She therefore requested ECA to grant her one year's special leave without pay. In a letter dated 12 February 1988, the Personnel Officer rejected the Applicant's request and reiterated that ECA's recommendation to separate her from the Organization for abandonment of post would be approved unless the Applicant gave notice by 22 February 1988, of her intention to return to ECA immediately. According to the record of the case, the Applicant did not reply to this communication.

On 23 March 1988, the Assistant Secretary-General for Human Resources Management approved ECA's recommendation to separate the Applicant from the Organization for abandonment of post, effective 28 December 1987. In a letter dated 25 March 1988, the Personnel Officer conveyed this decision to the Applicant.

In a memorandum dated 30 March 1988, the United Nations Medical Director, who had reviewed the case following the Staff Council's intervention, suggested to the Assistant Secretary-General, OHRM, that the Applicant's request for special leave without pay until 31 May 1988 be reconsidered. He noted that although 10 weeks' sick leave "should have been sufficient" to undergo "the required neurological investigations", the Applicant "may have been ill-advised, and even confused, by her contacts with various medical and dental colleagues". He reiterated that as "mentioned earlier [he] had been in favour of special leave without pay" and had suggested that the Applicant's request might be reconsidered "in view of her extensive UN service".

In a Note for the File dated 27 April 1988, the Assistant Secretary-General, OHRM, noted that given the history and background of the Applicant's case, it was difficult to conclude that she "[would] indeed return to ECA at the end of her treatment". Consequently, he did not approve the United Nations Medical Director's recommendation, but indicated that he was prepared to reconsider the matter if the Applicant returned to Addis Ababa.

On 25 May 1988, the Applicant requested review of the administrative decision to separate her from the Organization for abandonment of post. In a reply dated 29 July 1988, the Assistant Secretary-General, OHRM, informed the Applicant that the decision would be maintained.

On 7 September 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 May 1990. The conclusions and recommendation from the majority of the Panel read as follows:

"Conclusions and recommendation

63. The majority of the Panel concludes that:

- the Administration's discretion not to grant the appellant SLWOP [special leave without pay] was properly exercised,

- the appellant abandoned her post when she absented herself from work from 28 December 1987 to 23 March 1988 without authorization and justification, despite the Administration's repeated requests that she return to duty,

- the Respondent's decision to separate the appellant from service for abandonment of post was not improperly taken.

64. Accordingly, the majority of the Panel makes no recommendation in support of this appeal."

In a dissenting opinion, the Member of the Panel elected by the staff stated as follows:

"...

2. On account of the misunderstanding on the part of the Office of Human Resources Management, which resulted in an unintended confusion on the part of both the appellant and the Administration, a request for SLWOP was submitted at a later date than it should have been.

3. Since the requested extension of sick leave was denied in November 1987, the appellant had no other option but to request SLWOP.

4. At that point, OHRM should have insisted that ECA grant the appellant SLWOP immediately, instead of giving her a series of deadlines to return to duty.

5. SLWOP is frequently granted to staff members in this Organization for the purpose of taking care of an ailing relative or for the purpose of travelling with a reassigned spouse. In many cases, SLWOP may be renewed on a yearly basis and posts remain blocked until the staff member's return.

6. No fault rests on the part of the United Nations Medical Service in this case. Although they did not feel that the appellant qualified for additional sick leave, they did later recommend that she be granted SLWOP.

7. The denial of SLWOP did not constitute a valid exercise of the discretionary authority provided under staff rule 105.2 in view of the precedent established in granting SLWOP to other staff members with less stringent reasons than that of the appellant. Consequently, the refusal of the appellant to return to duty, after the denial of SLWOP, should not work to her detriment.

8. I therefore recommend that the appellant be reinstated."

On 22 May 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the report of the JAB and informed her that the Secretary-General, having reviewed her case in the light of the JAB report, had decided to maintain the contested decision.

On 15 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant intended to return to her post in Addis Ababa.

2. The Respondent improperly exercised his discretion in not granting the Applicant special leave without pay.

Whereas the Respondent's principal contentions are:

1. The Medical Director determines the fitness for work of staff members and approves their sick leave on behalf of the Secretary-General.

2. The Respondent properly exercised his discretion in not granting the Applicant SLWOP.

3. Unauthorized absence from work, following notice to report for duty, constitutes unilateral breach of the contract of employment and thus abandonment of post warranting separation from service.

The Tribunal, having deliberated from 4 to 25 June 1992, now pronounces the following judgement:

I. It is incumbent on the Tribunal in the present case to determine whether the conclusion of the Joint Appeals Board in its report dated 16 May 1990, to the effect that the Applicant abandoned her post, is sound.

The Tribunal also has to determine whether the Administration's refusal to grant the Applicant special leave without pay has any implication for this abandonment of post if the latter should be established.

II. Termination for abandonment of post is not explicitly provided for in the Staff Rules. However, annex III, paragraph (d), to the Staff Regulations provides that "no [termination] indemnity payments shall be made to ... a staff member who abandons his or her post". Staff rule 109.5(i) stipulates that "no [repatriation grant] payments shall be made ... to a staff member who abandons his or her post". The Tribunal recalls the precedent set by its Judgement No. 174, Dupuy (1973), para. VII, in which the following principle is enunciated: "The prohibition against paying termination indemnity to a staff member who abandons his post would be meaningless if abandonment of post was not a distinct and independent reason for termination".

III. In its Judgement No. 380, Alam (1987), para. VI, the Tribunal considered that abandonment of post derives from the staff member's conduct, regardless of his or her expressed or unexpressed intent. Abandonment of post is therefore an objective notion. In the Alam case, the Tribunal considered that several refusals to return to work despite orders by the Administration to do so, constituted abandonment of post, justifying termination. In its Judgement No. 265, Kennedy (1980), para. X, the Tribunal held that, after having instructed the Applicant to return to work by a certain date, the Secretary-General could decide to consider the Applicant's failure to do so as a repudiation of contract.

IV. In the present case, it is not contested that the Applicant went to the United States at the end of August 1987, for medical treatment. In addition to her annual leave, she was granted, retroactively, eight weeks of sick

leave. Also, she was given two weeks leave in respect of the medical evacuation initially approved when she decided to go to Nairobi. However, since she had not been granted further sick leave, her absence from Addis Ababa, her duty station, was unauthorized, as from 28 December 1987. It is equally clear that the Applicant did not return to Addis Ababa, even after several postponements of the date on which she was to return and despite warnings to the effect that her continued absence would lead to her termination on the ground of abandonment of post. From her application, it would seem that she may actually still be in the United States.

V. The unauthorized absence of the Applicant after numerous warnings, constitutes in law a unilateral breach of the contract of employment and abandonment of post, justifying termination.

VI. It is conceivable that, since the Applicant was not on sick leave as from 28 December 1987, she might have been granted special leave without pay, but though she requested it, no such leave was granted. According to the Tribunal's jurisprudence "a grant of SLWOP [special leave without pay] for medical reasons is not a right of the staff member, but is within the discretionary authority of the Secretary-General" (cf. Judgement No. 422, Sawhney (1988), para. VIII). In the circumstances of the case, it does not appear that the refusal to grant the Applicant special leave without pay was prompted by discriminatory motives or based on considerations other than the requirements of service.

VII. The Tribunal nevertheless considers that the decision not to grant the Applicant special leave without pay may be regarded, in point of fact and irrespective of any legal consideration, as regrettable, in view of the Applicant's state of health and in particular because, at the time when her request was submitted, the Applicant had been employed by the Organization since 1961, i.e., for 26 years. Moreover, it appears that the Applicant's request for special leave without pay was based on the advice she had been given by the UN Medical Director at Headquarters.

VIII. The Applicant, in a communication to the Tribunal dated 2 June 1992, alleges that the Administration has still not paid her the per diem to which she was entitled at the time of her medical evacuation and that she has "not yet received what is rightfully [her] compensation under the Staff Rules". She further claims that the medical insurance has, wrongly, refunded to her only part of the medical expenses she has incurred. The Tribunal notes that, as these questions were not raised before the Joint Appeals Board, the Tribunal cannot consider them. The Tribunal, nevertheless, expresses the hope that the Administration will pay particular attention to these claims.

IX. The Tribunal further expresses the hope that, in view of the circumstances, should the Applicant return to Addis Ababa and submit, within 45 days of notification to her of this Judgement, an application for employment in a post for which she is fully qualified, the Administration will give it favourable consideration.

X. For the above reasons the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Mikiun Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 26 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary